6-2101-5012-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE ST. PAUL CITY COUNCIL

City of St. Paul

vs.

Midwest Outdoor
Advertising Company

FINDINGS_OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

A contested case hearing in the above-entitled matter was held on February 13, 14, April 12 and July 19, 1991, in St. Paul, before Allan W. Klein, Hearing Examiner for the City Council.

Appearing on behalf of the City of St. Paul was Thomas J. Weyandt, Assistant City Attorney, 800 Landmark Towers, St. Paul, Minnesota 55102. Appearing on behalf of Midwest Outdoor Advertising Company were Earl P. Gray, One Capitol Centre Plaza, Suite 1300, St. Paul, Minnesota 55102 and John E. Thomas, Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, Minnesota 5SlOl.

The record in this matter closed on October 23, 1991.

This Report is a recommendation, not a final decision. Pursuant to sections 310.05 and .06 of the City's Legislative Code, the Council shall provide the licensee opportunity to present oral or written arguments alleging error on the part of the Examiner in the application of the law or interpretation of the facts, and to present argument related to the recommended adverse action. The Council may accept, reject or modify the Findings, Conclusions and Recommendation of the Hearing Examiner.

Ruling on Motion

On the first day of the hearing, the Licensee made certain motions which had not been previously filed. The Examiner took one of them under advisement, indicating that he would give the City an opportunity to respond before ruling. The City did respond at the end of the hearing, and the matter is now ripe for ruling.

Licensee had moved to limit the scope of the hearing to matters existing in 1991, rather than including matters which had occurred prior to 1991. This was based on the theory that the City had renewed Midwest's license on

January 3, 1991, thereby waiving any right to take adverse action against the license for acts occurring prior to that date. The City's response was that relicensure was not a bar to using prior events as a basis for adverse action, and that the gist of the charge against the Licensee was its ongoing course of violations of the City Code. The Examiner now rules that the City's relicensure in January of 1991 does not bar it from considering acts prior to that date. See, Memorandum.

Based upon all of the testimony , exhibits and evidence in the record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Midwest Outdoor Advertising Company is wholly owned by Peter Remes, a lifelong resident of St. Paul.

2. Remes has been in the outdoor advertising business approximately seven years. He began in late 1983, after finishing college. He took on a partner in 1985 who remained with him for about two and a half years, and has continued as the sole owner.

Tree Trimming at 1164 Rice Street

3. The property at 1164 Rice Street is owned by Pipeline Oil Co. Midwest Outdoor Advertising had a sign on the property. On the boulevard between the Pipeline property and the street, there was a nine-inch white ash tree. By August of 1990, branches of the tree had grown to the point where they were obstructing the view of the Midwest sign, and, in fact, would hit against the sign from time to time.

4. On August 31, 1990, Peter Remes and one of his employees, James Egert, went to the location. Remes went inside the building and asked Don Esch, the owner of Pipeline Oil Co., whether Esch would mind if Midwest cut back the tree limbs that were hanging over the sidewalk and over Pipeline's property. Remes explained to Esch that the tree limbs were interfering with access to the sign, and making it difficult to get a ladder up to put a poster on it. Esch indicated he had no objection to the proposed trimming, because he had some big fuel trucks which were being hit by one of the tree limbs as well. Esch also thought that the tree might pose a danger to persons on the sidewalk because it had some small branches that were about at eye level. Remes had Egert cut back approximately three tree limbs.

5. Egert did not cut the limbs all the way back to the trunk of the tree, and left the tree in a somewhat unusual appearing form, with at least one large limb without any leaves extending out from the trunk, having been cut off in the middle of its length. Ex. Ala. Within two weeks of August 31, the City trimmed the tree substantially more than Remes had done, and in the

process, removed the branch which Egert had only partially cut off. Ex. 2.

6. The next day, Remes received a call from Gregory A. Reese of the City's park forestry section. Reese informed Remes that it was improper for him to have trimmed a city-owned boulevard tree. Then Remes received a form letter, dated September 10, 1990, from Reese. This letter was directed to four advertising companies (Adventure, Midwest, Naegele and National). It informed them that it was unlawful to cut a tree that was planted on public property, that advertising companies had recently trimmed city-owned trees to improve sight lines for their signs, and that the forestry section would levy fines for damage to trees. Ex. A3. Remes called Reese and apologized for the incident, again explaining what had happened. Reese seemed to be understanding, but informed Remes that it was city policy to prohibit such tree-trimming, even if trees interfered with advertising signs. Remes assumed that everything was forgiven. However, on or about October 12, Remes received an invoice from Reese for $1100. This was for "damage" and "loss of value" to the nine-inch white ash. Attached to the invoice was a letter, dated September 12, 1990, from Reese to Remes, indicating that the tree had been seriously disfigured,

that the trimming violated an ordinance, and that the forestry section was levying a fine in compensation for damages. Ex. 1. Remes and his attorney went to visit Reese, but Reese would not discuss the matter with them.

7. Remes was not aware that there was any prohibition against trimming the tree, at least so long as the trimming were limited to that portion of the tree branches extending onto the Pipeline property. He did not seek or obtain permission from the City to trim the tree. He was unaware of the specific terms of section 176.03 of the City's Legislative Code.

874 White Bear Avenue

8. On November 7, 1983, Midwest entered into a lease with one Ames Haley, allowing Midwest to erect an advertising sign at 874 White Bear Avenue. The lease document provides that Haley:

> . . . represents and warrants that [he] is either the owner or the agent of the owner of the premises above-described, Land] has full authority to make this lease . . . .

It was later discovered that Haley was only a tenant, not the owner.

9. On November 7, 1983, Remes applied for a building permit to erect a 12-foot by 6-foot sign on the property. In the application for the permit, he indicated that the owner was "Ames Haley". The permit was granted on November 16. It was extended in 1984 and thereafter. On June 18, 1987, one John E. Mueller signed a sign lease with a division of Midwest for the property at 874 White Bear Avenue. The lease provides for a ten-year term, running from June of 1987. The lease fee is $400 per year The lease provides:

> The person signing this agreement represents and warrants that he is the owner or the representative of the owner of the property and is duly authorized to execute this agreement.

Mueller was the owner, both in 1983 and 1987.

10. On May 17, 1988, City Zoning Inspector John Hardwick sent a letter to John Mueller, indicating that an old pole sign, which had previously been used as a business sign, had been converted to an advertising sign for Parkway Auto Body. Hardwick's letter goes on to note that in addition to this Parkway Auto Body sign, there is also a Midwest sign on the same property, and that the City Legislative Code requires that advertising signs along White Bear Avenue be spaced at least 660 feet apart. Hardwick advised that the Parkway

Auto Body sign must be removed, or converted to a business sign, by June 1. On June 3, 1988, Hardwick noted on a zoning complaint form (Ex. B2, p.2) that he had spoken with Mueller who indicated that he needed 30 days to remove Midwest's advertising sign. There had been some disagreements between Mueller and Midwest, and Mueller decided he would rather keep the Parkway sign and get rid of the Midwest sign.

11. On December 28, 1988, Mueller sent a letter to Midwest, indicating that the City had demanded that one sign be removed from the property, and that Mueller wanted Midwest to remove its sign within 30 days, Ex. B4, p. 3. On February 23, 1989, Hardwick wrote to Mueller, indicating that the advertising sign for Parkway Auto Body had not been removed, nor had a permit been applied for, and indicating that unless the sign were removed or a permit obtained by March 6, a tag would he issued. On February 23, 1989, Hardwick noted on a zoning complaint form that he had spoken with the manager of an employment office at 874 White Bear Avenue, and told him that the sign must be removed or a permit obtained. On March 1, 1989, Hardwick spoke with John Mueller regarding the problem. Mueller told Hardwick that he had sent a letter to Midwest asking them to remove their sign. Ex. B2, p. 1. On March 15, 1989, Mueller sent a letter to Hardwick confirming their telephone conversations and enclosing copies of letter which Mueller had sent to Midwest Outdoor Advertising. Ex. B4, p. 1.

12. On March 15, 1989, Mueller again wrote to Midwest, indicating that he wanted the Midwest Advertising sign removed from the property. Ex. B5. On July 21, 1989, Remes wrote to Hardwick, enclosing a copy of the letter of permission dated May 30, 1987 between Mueller and Northwest Outdoor. Remes indicated to Hardwick that a permit had been obtained for the sign. Remes went on to indicate to Hardwick that he believed that the business sign on the property was to be used exclusively to identify the business at that location. Ex. B3, p. 1.

13. On March 1, 1990, Lawrence R. Zangs, a City zoning technician, wrote to Mueller, indicating that he had still failed to deal with the Parkway Auto Body sign and that it must be removed by March 12, 1990.

14. Currently, the property still has two signs, within 30 feet of each other. One is a Midwest sign, advertising "Silver Ridge Apartment Homes". The second is a sign for "Parkway Auto Body". Both are advertising signs; neither is a business sign.

15. In summary, Midwest first obtained a building permit based upon a lease from a tenant (Haley), not the owner (Mueller). However, Mueller later did sign a lease with Midwest. When the gas station which had been on the premises went out of business, the gas station sign was taken down from the pole and Mueller negotiated the lease of the pole to Parkway Auto Body for an advertising sign. It is illegal to have two advertising signs so close

together. Mueller was unaware of this at the time, but was dissatisfied with Midwest because of payment difficulties and, once he was notified by the City that he could not have two advertising signs, decided in his own mind that he preferred to have the Parkway sign remain and the Midwest sign be removed. However, he had signed a ten-year lease with Midwest in 1987. The City does not, however, purport to adjudicate disputes between a sign company and a landowner, such as the one which now exists between Mueller and Midwest. That is properly a civil matter. The City does have an interest, however, in assuring that not more than one sign is on the property. Back in May of 1988, Hardwick wrote to Mueller, informing him that the conversion of a business sign to an advertising sign was improper because the existing Midwest sign was too close to the new advertising sign. Hardwick directed Mueller to remove the Parkway Auto Body sign. That is a correct statement of the law, from the City's perspective. This directive was repeated by Zangs in his March 1, 1990 letter to Mueller. From the City's standpoint, it is up to Mueller to either

remove the Parkway sign, or face further enforcement action from the City. Midwest has done nothing wrong in these circumstances, at least nothing that should be adjudicated or evaluted in this forum.

1427 White Bear Avenue

16. On May 24, 1989, a permit was issued to Midwest for construction of an advertising sign at 1427 White Bear Avenue. For unknown reasons, there was no activity at the site during the summer or fall of 1989.

17. On March 31, 1990, Midwest dug a hole and erected a sign, with the work being completed either on that day or the next. The sign was erected without obtaining a footings inspection. A City zoning technician, Larry Zangs, happened to be driving by the site on March 31 (a Saturday), and observed the sign being erected. He received a complaint on April 2 (Monday) regarding the sign, and on that date, went out to the site to inspect it. He spoke with a business owner at 1435 White Bear who had also seen the sign being installed on March 31. The sign was located close to the property line between 1427 and 1435 White Bear, and Zangs took measurements to see which property it was on. He left a door hanger on the doorknob at 1427 White Bear Avenue, requesting the property owner to contact him.

18. On April 4, Zangs received a call from James Egert. Egert confirmed that he owned the property, and that he had contracted with Midwest for the sign installation. Zangs, who by that time had discovered the May 24, 1989 permit, told Egert that the permit had expired (permits are only good for 180 days). Zangs also said the sign was illegal because there was no footing inspection. Egert agreed to have the contractor remove the sign and reapply for the permit. Ex. E3 and E2.

19. Midwest did take the old sign down. On April 15, 1990, Midwest applied for a new permit, which was issued on April 30. On May 2, a city inspector was called to inspect the footings for the sign, and after he ordered more work to be done, he approved the footings on May 3. The sign was finally approved, as built, on May 21.

20. Egert, who works for Midwest, testified that the hole had been dug in September or October of 1989, but the sign had not been installed then. The neighboring business owner, however, who cared for his own lawn, which extended extremely close to where the original sign was erected in March of 1990, testified that he did not see any hole at that location during the fall, winter or spring. In addition, Don Tschida (a city inspector who worked primarily in an area on the east side of St. Paul, from Johnson Parkway East), noted on the back of the original permit that the sign had not been installed as of November 20, 1989. Ex. E4. It is concluded that, on balance, it is more likely than not that the hole was not dug in the fall of 1989, but rather was first dug in the spring of 1990. Therefore, the old permit had expired.

21. There had been no footings inspection the first time the sign was erected. However, footing inspections were not always performed prior to April of 1990. While inspectors did some of them as far as eight to nine years ago, it was only done sporadically. After April of 1990, all footings (or almost all, depending on workload), are inspected. On April 12, 1990, Gene Reilly, a senior inspector with the City, sent a letter to Midwest,

informing them that the City will be inspecting all installations, and the City must be notified when installation begins. Ex. 7.

201 North Snelling

22. On May 4, 1987, Metropolitan Outdoor Advertising, located at 315 North First Avenue in Minneapolis, applied for a building permit to erect a sign at 201 North Snelling. The permit was granted on May 22. Ex. F6. Inspector Russell Booker visited the site on June 2, October 7, October 8, November 20 and December 29, all in 1987. He found no evidence of any work having been done. On November 30, 1987, John Hardwick sent a letter to Metropolitan stating that as of November 27, work had not been started nor had an extension or renewal been applied for. Therefore, Hardwick informed Metropolitan, the permit was null and void. Ex. F5. There was no response or appeal from Metropolitan, Midwest, or any other person.

23. At sometime in early February 1990, Inspector Booker noticed construction activity at 201 North Snelling. A large sign was being built. Booker was not aware of any permit which would have allowed it. Inquiry revealed that the property was owned by either Remes or Midwest, as well as the fact that there had been a permit issued previously to Metropolitan, but cancelled. In a telephone conversation between John Hardwick and Peter Remes which occurred on February 1, 1990, Remes informed Hardwick that he had a permit for the sign and would provide a copy, but this was not done.

24. On February 7, Booker prepared a municipal court complaint against Midwest for installing a sign without a permit or inspection. On March 29, 1990, the matter was brought to trial before the Honorable Kenneth Fitzpatrick, Judge of District Court. The transcript of those proceedings indicates that the prosecutor moved to dismiss the charge because Remes had shown her sufficient proof that there was a permit for the sign to be installed. Judge Fitzpatrick dismissed the charge. Ex. 10.

25. The 1987 permit issued to Metropolitan identifies Metropolitan as the landowner. Peter Remes, however, indicated that he (or Midwest) was the landowner, but that there was a "relationship" between Midwest and Metropolitan. James Egert also testified that Metropolitan fabricated the sign for Midwest and that the two were in a "venture". There is, however, no other evidence of this relationship in the record, nor is there any explanation of why neither Metropolitan nor Midwest did not respond to the November 30 cancellation if, in fact, they had commenced construction prior to that date. Taking all of the evidence into consideration, the Administrative Law Judge concludes that there was no commencement of construction in 1987 and that the permit was no longer valid when construction did commence in January or February of 1990.

26, The property at 201 North Snelling houses a small shop which was

used as a Flower Hut. When Booker went to the site in late January or early February of 1990, he noticed a portable sign there, being used to advertise the Flower Hut, as well as a temporary sign leaning against the side of the building, advertising the availability of roses. Exs. F11 and F12. On February 7, 1990, Darrin Johnson, the owner of the Flower Hut requested and received a permit for the portable sign. The permit was limited to 14 days only. Ex. F2. On that same day, Johnson also notified the City that Flower

Hut would be displaying two temporary banners for 30 days. On February 12, Hardwick wrote to Johnson, denying his request for the two temporary banners because Midwest had two illegal signs on the property, and no further permits would be issued until they had been removed. Hardwick testified at the hearing that the portable sign permit had been issued without his knowledge, and had he been aware of it, he would have denied it because of the existing large advertising sign which he believed to be in violation. Regardless of that, Flower Hut had obtained a permit for the portable sign shortly after learning a permit was needed. All of the dealings regarding the portable sign were between Flower Hut and the City. Midwest was not involved in them at all.

842 University Avenue

27. On August 14, 1986, the City issued a permit to Midwest for a sign at 842 University Avenue. In the file was a letter of permission dated July 22, 1986 from a Gerald Martin, the landowner. Inspector Booker went to the site on September 24, 1986 and discovered that an additional sign had been placed on Midwest's pole. This second sign was located underneath Midwest's sign. It advertised a towing business which was operated on the property by the owner, Gerald Martin. Booker noted the sign's size as 2' x 8' on the back of the permit. Ex. G3. Remes testified that it was only 1' x 4'. The Hearing Examiner finds Booker's measure to be more credible under all of the circumstances.

28. This sign was placed on Midwest's pole by Martin. not by Midwest. However, since the second sign was not included within the terms of the permit, Booker noted it as a problem and, on November 10, 1986, he wrote to Midwest indicating that the second sign had to be approved and installed per code. Ex. G2. Upon receipt of this letter, Remes went to Martin and told him that it was illegal, and asked him to remove it. Martin said he would, but never did. On June 3, 1988, Hardwick wrote to Remes indicating that only one sign per location is permitted and the additional sign must be either removed or brought into conformance. Ex. Gl. Once more, between June of 1988 and February of 1990, Hardwick mentioned to Remes the fact that the second sign was still up and needed to be removed. Finally, in February or March of 1990, Martin moved out of the premises and Remes removed the sign from the pole.

234 North Snelling

29. The gist of this charge is that Midwest requested a permit for a 12' x 12' sign. That was granted. Instead of building one large sign,

however, Midwest erected two smaller signs, each 6' x 12', one underneath the other. There is a spacing between the two of approximately one foot. Based upon a definition in the ordinance, the City believes that these must be treated as two separate signs, and as such, they violate the spacing requirement which is for several hundred feet between two advertising signs.

30. On October 22, 1987, Inspector Booker sent a correction notice to Midwest, indicating that the two stacked signs were not in compliance with the permit. On October 24, Midwest replied indicating that Midwest believed that two signs on a single pole were also authorized. Ex. H3.

31. On December 1, 1987, Remes wrote to Hardwick, agreeing to reconstruct a sign which would be one complete 12' x 12' foot structure within

30 days. Ex. H2. This was never done. Instead, on August 4, 1988, the City issued a new permit for a 8 x 1 6 foot sign. Ex . HI . This was never built, as Midwest sought legal advice and was told that there was nothing to prohibit stacked signs. What remains at the site as of the day of the hearing were two 6' x 12' foot signs, one underneath the other. Ex. H5 and H6.

32. The Code definition at issue, section 66.109G, defines "gross surface display area" as:

> the entire area within a single continuous perimeter enclosing the extreme limits of such sign, but in no case passing through or between any element of the sign . . . . The perimeter shall not, however, include supporting framework or bracing when not used as a sign display surface.

Section 66.214 limits the gross surface display area of an advertising sign and also sets forth minimum spacing requirements between signs. Both of these restrictions vary, depending upon the functional street classification assigned to the particular street where the sign is located. In addition, other sections of the code contain additional restrictions based upon the ratio of the gross surface disply area of all business signs on the lot to the lineal feet of lot frontage of the lot, with the ratios varying depending upon the zoning district involved. In this particular case, however, what is at issue is the limitation on the minimum spacing between advertising signs.

33. It is found that the definition of gross surface display area does define a sign in such a way that two signs, stacked one above another, with a definite gap between them as exists in this case, do constitute two separate signs. As such, they must meet the minimum spacing requirement.

34. The primary defense to this charge, in addition to questioning the applicability of the definition to the spacing requirement, was the presentation of numerous examples of Naegele signs which were either stacked or side-by-side. The City does not dispute the fact that those signs exist but rather argues that there have been numerous changes to the sign ordinance over the years, and that signs which were legal when erected continue as nonconforming uses even after the amendments to the code would prohibit their erection if new. As explained more fully in the Memorandum, Respondent has failed to demonstrate a discriminatory purpose behind the city's enforcement actions. The fact that the City has cited this violation by Midwest, but not cited Naegele for similar violations (if there have been any) is not enough to

dismiss Midwest's violation. See Memorandum.

460 University Avenue

35. On September 5, 1986, the City issued a permit to Midwest to build a sign at 460 University Avenue. Attached to the permit application is Midwest's drawing, dated August 28, 1986, indicating that the proposed sign would be exactly 100 feet from a sign on top of a Crown Auto Store to the east of 460 University. The drawing includes an indication as follows:

> On-premise business Crown Auto sign used to advertise Crown Auto only!

The drawing also contains another notation indicating: "100 feet to on-premise Crown Auto sign; 165 feet to nearest advertising sign." The nearest advertising sign is on a building even further to the east of the Crown Auto building.

36. When John Hardwick approved this application, he noted on both the building permit and the site plan that Midwest "must maintain 100 feet from sign on roof of Crown Auto store." On December 18, 1986, Inspector Booker went out and measured the Midwest sign, and found it was 97 feet from the Crown Auto roof sign. When Hardwick was informed of this fact, he thought that the difference of three feet was not worth the City's expenditure to have it corrected. He did, however, mention it to Remes.

37. There was a substantial change in the spacing requirement for signs such as this in 1988. On October 26, 1989, Midwest applied for a demolition permit to demolish this sign and requested that its square footage be applied to Midwest's "nonconforming sign credit". The City had a program at that time which allowed companies which removed nonconforming signs to receive credit for their removal. Hardwick approved this arrangement, and the sign was demolished sometime in December of 1989.

38. At the time of the application, and at the time that the permit was granted, the sign on the roof of the Crown Auto Store advertised Crown Auto. Indeed, photographs taken in April of 1991 show that the sign still advertises Crown Auto. Midwest Ex. 50 and 51. It meets the test of a business sign (as opposed to an advertising sign). A business sign is defined as:

> a sign which directs attention to a business . . . which is conducted . . . on the premises upon which the sign is placed. It shall be considered as an accessory sign.

The 100-foot spacing requirement applies only to the spacing between two advertising signs, not to the spacing between an advertising sign and a business sign. Therefore, there was no reason to require a 100-foot placement between the Midwest sign and the Crown Auto sign. While the appropriate procedure would have been for Midwest to protest the 100' limitation placed on the permit, rather than accept it and then violate it, the violation is de minimis in light of the three-foot spacing and the fact that there was no basis for it in the first instance.

1333 Randolph Avenue

39. On July 17, 1985, the City issued a permit to Midwest to construct a sign on the east wall of the building at 1333 Randolph. Wien the sign crew went out to actually construct the sign, the building owner changed his mind, and said he wanted to construct his own sign on the wall, but that Midwest

could place its sign on a pole in the adjacent parking lot. Midwest proceeded
to erect the pole sign in the parking lot,

40. On August 16, 1985, a building inspector noticed that the sign was in the parking lot, not on the wall. Pole signs require the submission of structural drawings along with the permit application, whereas wall signs do not. In December of 1985, an inspector spoke with Peter Remes and was told the story about the building owner's desire to keep the wall sign location for

himself. Ex. J2. On February 3, 1986, the building inspector wrote to Remes regarding three matters, one of which was the 1333 Randolph situation. He directed Remes to remove the pole sign by February 18, 1986. Ex. J4. On February 14, Remes replied, indicating what had happened and asking to amend the permit to indicate the new location.

41. On February 14, 1986, Midwest filed a new application for a pole sign. Ex. J3. On March 20, 1986, Hardwick wrote to Remes, indicating that the new permit could not be issued because Midwest's contractor's license had not been renewed. On May 6, the permit for a pole sign was finally issued after Midwest renewed its license and agreed to pay a "double fee", which is essentially a fine. Ex. J3.

2366 West Seventh Street

42. In August of 1986, Midwest obtained a permit to build a sign at 2366 West Seventh Street. Attached to the permit was site plan, indicating various distances from other signs, residences, etc. After the sign was built, a nearby business owner (who had a business relationship with the landowner) complained that the new sign was blocking public view of his business sign. In an attempt to satisfy this concern, Remes moved Midwest's sign approximately 85 feet, but did not seek a permit for the new location.

43. In June of 1988, a representative of MNDOT inquired about the propriety of the new location, and upon investigation, Hardwick directed Remes to either remove the sign or apply for a variance that would allow it to stay in its new location. Remes was given two weeks to do one or the other, but he did neither. On July 25, 1988, a citation was issued to Midwest, and by August 3, 1988, the sign was removed. Ex. Kl and K2.

Procedural History and Relationship between Hardwick-and Remes

44. As Midwest was beginning its business in the period 1983-1985, there were a few problems with the City, but none that could not be explained by Remes' relative inexperience. One of these related to his submission of a lease signed by a tenant, rather than the owner of the property. See Discussion under 847 White Bear Avenue. In the middle of 1985, Remes applied for a wall sign, but erected a pole sign at the request of a landowner. In early 1986, he let his contractor's license lapse. These are discussed more fully in connection with 1333 Randolph Avenue.

45. Midwest's license expired on December 31, 1985, and was not renewed until March 27, 1986. Ex. R.

46. On February 26, 1986, following the events at 1333 Randolph, John Hardwick wrote a letter to Remes, outlining a list of requirements that Remes must meet. They included such items as keeping his contractor's license current, not erecting signs without obtaining a permit in advance, placing structures in the location shown on the permit, etc. Ex. T. These were not

onerous or oppressive -- they were all required by statute or ordinance.

47. Although a few problems occurred during 1986 (460 University Avenue, 842 University), and 1987 (234 North Snelling), they were not all that

numerous or frequent. An additional problem arose in 1989 (1427 White Bear Avenue), but that was cured and a fine was paid. Midwest was licensed continually through that period. Ex. 02.

48. Relations between the City and Midwest deteriorated quickly In 1990.
In early February, Midwest erected the sign at 201 North Snelling. On February 6, 1990, Hardwick prepared a letter documenting Midwest's problems going back to 1986, and proposing to suspend Midwest's license until its signs
were brought into compliance and Remes was willing to agree to comply with the
rules relating to signs. Ex. 19. The City Attorney's Office recommended to Hardwick that he not mail this letter to Remes, and it never was mailed.
However, on February 7, Midwest was charged with a criminal citation for
erecting the sign at 201 North Snelling without a permit. This charge was dismissed on March 29, 1990. Ex. 10.

49. Midwest has traditionally posted a number of political campaign billboards. These are obviously time-sensitive, particularly as an election approaches. On July 26, 1990, Remes, Egert and Hardwick met because Remes was
concerned about delays in permit approvals, some of which were associated with
political campaign signs. In a letter dated July 26 which Remes dictated after the meeting, Remes wrote to Hardwick and listed five specific sign
locations which had not been approved. One had been pending since April 15, the others had been submitted between July I and July 10. Remes indicated that during the last 90 to 120 days, Midwest had experienced "unusual delays" in application processing, and that was causing problems for the company, particularly in the case of time-sensitive signs. He asked what could be done
to speed up the approval process. Midwest Ex. 45.

50. On August 1, 1990, Hardwick replied, responding to each of the five specific locations listed by Remes, indicating that in each case (except one),
the delays were due to incomplete information being submitted by Midwest. In the remaining case, it appears that the City was at fault for failing to
process an application. The tone of both Remes' and Hardwick's letters is negative, and it is clear that the relationship between the two was not positive. On August 8, 1990, Remes replied to Hardwick's response, generally
rebutting Hardwick's explanations for the delays, and reasserting Midwest's earlier stated position that excessive delays and demands for additional
information have been growing and growing since the first of the year. Midwest Ex. 47. On August 21, 1990, Hardwick replied, attempting to rebut Remes' rebuttals, and further indicating that two more recent applications (not among those cited in the earlier letters) were incomplete, incorrect and would not be processed until additional information was submitted. Ex. V. In

the case of all of these letters back and forth, copies were sent to the writers' respective counsel, so it is clear that as of July 1990, an adversarial relationship had solidified.

51. On September 27, 1990, a Notice of Hearing was issued to Midwest by Assistant City Attorney Philip B. Byrne. The Notice set a hearing for November 5, and listed the August 31, 1990 tree-trimming incident, along with 12 other matters. A copy of the Notice was sent to Naegele's attorney, who had asked to be informed of the hearing date. The hearing was postponed a number of times due to scheduling conflicts, finally beginning in February of 1991.

52. On November 16, 1990, the City sent out a renewal notice to all of its trade licensees, including Midwest, reminding them that all licenses

expired on December 31. The Notice contained instructions for renewing licenses. Ex. P. On December 5, 1990, Midwest submitted its application for a renewed license, the fee was deposited on December 15, and a new license was issued January 3, 1991. There is no indication in the record that this renewal was anything other than a ministerial, clerical act.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The St. Paul City Council has jurisdiction over the subject matter of this hearing, including violations which occurred prior to January 3, 1991.

2. Proper notice of the hearing was timely given. All relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Hearing Examiner.

3. Midwest Outdoor Advertising did violate section 176.03 of the City's Legislative Code when, on August 31, 1990, one of Midwest's employees cut a number of tree limbs off of a tree on the boulevard at 1164 Rice Street.

4. Midwest did violate section 66.404 of the Code when it submitted an application which contained the consent of a tenant, Ames Haley, for a permit at 874 White Bear Avenue. This was the first year that Midwest had been in business, and the violation was unintentional. The permit was granted and the sign was erected, and maintained for several years before anyone was even aware of the problem. In June of 1987, the actual owner, John Mueller, did sign a letter of permission.

5. Midwest has not violated any ordinance by maintaining its sign at 874 White Bear Avenue. There is a dispute between Midwest and the property owner, John Mueller, because Mueller would rather get the rent from the Parkway sign than the rent from the Midwest sign. But the City does not get involved in adjudicating disputes such as this, and Midwest cannot be disciplined for it. It is a matter for the civil courts.

6. Midwest did violate section 66.201 by erecting the sign at 1427 White Bear Avenue after the permit had expired. In addition, Midwest violated section 66.407 by failing to give 48-hour notice prior to erection as required in paragraph (a) of that section. However, Midwest did not violate paragraph (b) of that section, which provides that footing inspections "may" be required by the zoning administrator, because prior to April 12, 1990, Midwest did not have notice that the zoning administrator was requiring footing inspections.

7. Midwest did violate section 66.201 by erecting a sign at 201 North Snelling after the permit had expired. Midwest did not violate any provision

of the Code when Darrin Johnson, or the Flower Hut, displayed a portable sign at the address.

8. Midwest did violate section 66.201 of the Code by allowing a "tag along" business sign on its pole at 842 University Avenue.

9. Midwest did violate the spacing requirement of the Code when it erected a stacked sign at 234 North Snelling. Two signs, stacked one above

another, having a definite gap between them, must meet the spacing requirements.

10. Midwest did not violate the spacing requirements of the Code when it erected the sign at 460 University Avenue so that it was only 97 feet from a Crown Auto Store sign to the east. The Crown Auto Store sign was a business sign, and the 100-foot spacing requirement does not apply to the spacing between an advertising sign and a business sign. The City has not demonstrated any purpose behind Hardwick's 100-foot limitation in the permit, other than the fact that he misunderstood the nature of the Crown Auto sign. Therefore, there was no violation by Midwest.

11. Midwest did violate section 66.404 of the City's Legislative Code by applying for a wall sign, but building a pole sign. Midwest did, however, ultimately obtain a permit for the pole sign by paying a "Jouble fee" fine.

12. Midwest did violate section 66.404 by moving the sign at 2366 West Seventh Street 85 feet from its permitted location.

13. Midwest failed to prove a discriminatory purpose behind the enforcement posture of the City vis a vis Midwest and Naegele. Therefore, none of the above-cited violations can be excused by virtue of the City's treatment of Naegele.

Based upon the foregoing Findings and Conclusions, the Hearing Examiner respectfully makes the following:

RECOMMENDATION

That the billboard and sign business license held by Midwest Outdoor Advertising Company be suspended for a period of 20 business days during which time Midwest shall not be permitted to enter into any new contracts or erect any new signs.

Dated this 31st day of October, 1991.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

The Council is respectfully requested to send its final decision to the Administrative Law Judge by first class mail.

Reported: Tape Recorded, 12 tapes.

MEMORANDUM

I.

Midwest's Motion to limit the scope of this hearing to events which occurred, or were still ongoing after January 3, 1991, was denied. The basis for the denial was that the gist of the City's complaint -- that there was an ongoing disregard for the City's ordinances -- by its very nature requires a number of examples.

This is similar to a disciplinary action against a professional license, such as that of a doctor or dentist, for unprofessional conduct over a period of time and a number of incidents. For example, in the Matter of the Proposed Disciplinary Action Against the Dentist License of Roger H. Schultz, 375 N.W.2d 509 (Minn. App. 1985), the Court of Appeals upheld the indefinite suspension of a licensee in 1985 based upon events which went back to at least 1975. The dentist argued that it was "unfair" to consider an incident which took place in 1975. The Court rejected that argument, noting that there is no statute of limitations in the statutes governing the dental profession.

It has also been stated that courts usually hold that a general statute of limitations does not apply to administrative disciplinary matters. Beck, Bakken & Muck, Minnesota Administrative Procedure, (Butterworth's, 1987) at P. 95.

A different result could occur, however, under the doctrine of laches. This would apply if (1) the passage of time had prejudiced Midwest because of the absence of essential witnesses, the failure of memories, etc., and (2) the delay was unreasonable and inexcusable. See, for example, State v. St. Paul Fire & Marine Insurance, 434 N.W.2d 6, 8-9 (Minn. App. 1989); In re N.P,, 361 N.W.2d 386 (Minn. 1985), appeal dismissed, 106 S. Ct. 375 (1985). In the case of Midwest Outdoor Advertising, however, there was no prejudice in that there was no serious claim of lapsed memory, unavailable witnesses, or any of the other factual indicia for applying the doctrine of laches.

The granting of Midwest's business license at the end of 1990 was a ministerial act. It was not based upon a reasoned analysis of all of the facts

and circumstances which were discussed during this hearing. Indeed, the hearing was originally scheduled to be held on November 5, 1990, but was continued to February primarily at the request of Midwest's counsel. To claim that because the City was barred from considering acts which occurred before 1991 could lead to much mischief by both the City and Respondents in attempting to either rush or delay the hearing based upon the relicensure date. There is simply no legal or public policy argument to support such a position.

II.

The 20-day suspension recommended above is based on a belief that Midwest must be punished for its past violations in order to "get its attention" and assure compliance in the future. The length of the suspension, however, ought not to be such as to put Midwest out of business permanently. Its violations are not that frequent. Midwest received between 150 and 175 permits during the past year. Obviously, the vast majority of Midwest's operations comply

with the City codes and ordinances. Moreover, it is clear that since February of 1990, John Hardwick has been "thoroughly reviewing" all of Midwest's activities. If there were other violations, they would have been noted. Indeed, Midwest has a legitimate complaint about the "fly specking" nature of Hardwick's review of recent applications. It has no doubt cost Midwest several thousand dollars. In addition, Midwest has been forced to incur large expenditures of time and effort, as well as expenditures for legal costs, in order to defend itself in this proceeding. Balancing all of these, the Examiner recommends that the suspension be for 20 business days, but it would be well within the Council's discretion to vary that number up or down based on its own evaluation of the facts.

A.W.K.